BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

IN THE MATTER OF THE REQUEST FOR AGENCY ACTION OF EP ENERGY E&P COMPANY, L.P. FOR AN ORDER POOLING ALL INTERESTS, INCLUDING THE COMPULSORY POOLING OF THE INTERESTS OF ARGO ENERGY PARTNERS, LTD., DUSTY SANDERSON, HUNT OIL COMPANY, KKREP, LLC, AND J.P. FURLONG CO., IN THE DRILLING UNIT ESTABLISHED FOR THE PRODUCTION OF OIL, GAS AND ASSOCIATED HYDROCARBONS FROM THE LOWER GREEN RIVER-WASATCH FORMATIONS COMPRISED OF ALL OF SECTION 2, TOWNSHIP 3 SOUTH, RANGE 5 WEST, U.S.M., DUCHESNE COUNTY, UTAH.	**ORDER RESOLVING AUGUST 3, 2015 PETITION FOR RECONSIDERATION** Docket No. 2015-013 Cause No. 139-130

On August 3, 2015, Petitioner EP Energy E&P Company, L.P. ("EPE") filed a Petition for Reconsideration of Amended Findings of Fact, Conclusions of Law and Order (the "Motion"). The Motion asks the Board to reconsider certain aspects of its July 28, 2015 Amended Findings of Fact, Conclusions of Law and Order (the "Amended Order"). On August 6, 2015, Respondent J.P. Furlong Co. ("Furlong") filed a Response to Petition for Reconsideration of Amended Findings of Fact, Conclusions of Law and Order ("Opposition") opposing the reconsideration relief sought by EPE. Based upon its review of these filings, the Board resolves the Motion as follows.

EPE in the Motion challenges, and asks the Board to reconsider, Finding Nos. 13 and 18, Conclusion No. 8, and Order paragraph No. 6, of the Amended Order. EPE states that its

reconsideration arguments all pertain to the basic underlying question of whether Furlong, in being deemed a consenting owner by the Board, is to bear (and receive) not only its own share of the costs and production proceeds, but also its proportionate share of the various nonconsenting owners' shares of such costs and production. Motion at 2. Stated another way, should Furlong as a consenting owner help to carry the interests of Argo Energy Partners, Ltd. ("Argo") and Dusty Sanderson ("Sanderson") as non-consenting parties, and therefore share in recouping the risk compensation award the Board has imposed upon those owners? EPE argues that Furlong should not share in recoupment of the risk compensation award/nonconsent penalty, while Furlong argues that it should.

I. Has Furlong agreed that it will not share in recoupment of the nonconsent penalty?

As noted by Furlong, Utah Code Ann. Section 40-6-6.5(4)(c) provides that each consenting owner shall be entitled to receive their own share of production, and, "unless the consenting owner has agreed otherwise, the consenting owner's proportionate part of the nonconsenting owner's share of the production" until costs (including any nonconsent penalty) are recovered. The statute therefore mandates that, absent a contrary agreement by Furlong, Furlong will help carry the nonconsenting parties and will share in recoupment of the risk compensation award.

EPE argues that Furlong has in fact "agreed otherwise" in this case, and consented to not sharing in recoupment of the risk compensation award. EPE bases its argument on Furlong's signing of the Authority for Expenditure ("AFE") and its refusal to sign the Joint Operating Agreement ("JOA") proposed by EPE. EPE argues that the AFE reflects only Furlong's election to bear *its own* proportionate share of the costs. EPE then notes that the JOA it proposed to

Furlong provides: "If and to the extent any of the Parties fails to execute this Agreement . . . [EPE], as Operator, alone shall be responsible to bear all costs and expenses attributable to said non-consenting Party's/Parties' interest(s) for purposes of the Agreement, but also shall be alone entitled to the benefits of any risk compensation award . . ." Motion at 5 (quoting paragraph III of Exhibit A to the JOA attached to the Amended Order as Exhibit 1) (Exhibit A to the JOA is also attached to the Abstract of Evidence annexed to the Motion as Tab 2) (this provision is hereinafter referred to as the "Paragraph III" provision). EPE argues in light of this provision that Furlong, in signing only the AFE and not the JOA, should not share in recoupment of the risk compensation penalty imposed upon the non-operators. Motion at 5-6.

Given the requirements of the statute, the question for the Board becomes whether Furlong, given its actions, has "agreed otherwise," and elected not to bear its share of the nonconsenting owners' interests. The Board finds that Furlong has not so agreed for two reasons.

First, there is no evidence indicating any affirmative agreement by Furlong not to bear its share of the nonconsenting owners' interests. The AFE signed by Furlong pertains to whether Furlong will bear its own share of the costs, but as noted by Furlong, doesn't speak to the carrying of nonconsenting owners. Furlong's signing of the AFE does not on its own answer the question at issue. The EPE-proposed JOA does touch upon the issue, stating that where a party fails to execute such JOA, EPE will treat that party as if it is not bearing any share of the nonconsenting owners' interests. But while Furlong did not sign the JOA, its refusal to do so

was based upon objections to provisions[1] unrelated to the carrying of nonconsenting owners.[2] The Board cannot construe Furlong's refusal to sign EPE's proposed form of JOA for unrelated reasons as an affirmative agreement not bear its share of the nonconsenting owners' interests.[3] The Paragraph III provision merely specifies how EPE intends to treat Furlong's interest in the event Furlong does not sign the JOA, it does not demonstrate that Furlong has affirmatively agreed to anything by not signing the proposed contract.

Second, Furlong is now a party to (and effectively signatory to) the EPE-proposed JOA in any event. It is true, as noted by EPE, that the Board ultimately adopted, and imposed upon the parties, a JOA containing the Paragraph III language. That agreement is therefore the governing agreement. But while Furlong may not have voluntarily executed that JOA prior to the hearing in this matter, the Board, pursuant to the power granted it by statute, has now

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[1] The majority of the terms of the proposed JOA were not disputed between the parties. A number of provisions, however, were disputed, and Furlong suggested edits to these particular provisions. These proposed edits were discussed at the hearing, but do not pertain to the carrying of the non-consenting owners. The Board did not find that the reasoning given in support of the requested changes was sufficient to outweigh the fact that the EPE-proposed provisions were standard in the industry, were commonly used in the subject field, were just and reasonable, and had already been agreed to by, and were controlling among, other consenting owners within the drilling unit at issue (*see* Utah Code Ann. § 40-6-6.5(2)(c)). The Board ultimately concluded that the proposed changes would not be adopted for purposes of this matter, and instead adopted the JOA proposed by Petitioner.

[2] EPE itself notes this fact in its Motion. See Motion at 5. This fact does not strengthen EPE's argument, however. Furlong proposed edits to certain unrelated JOA provisions in order to make the JOA acceptable to Furlong (i.e., in order to produce a JOA form Furlong was *willing to execute*). Furlong apparently desired to have this provision included and operate under circumstances where Furlong *did* execute the agreement. This evidences Furlong's intention to bear its share of the nonconsenting owners' interests. It does not indicate the reverse.

[3] If the Board were to hold otherwise, it would allow EPE to impermissibly condition Furlong's exercise of a statutorily-granted election right upon Furlong's acceptance of EPE's other (unrelated) proposed JOA terms.

imposed that JOA upon Furlong, thereby executing that agreement on Furlong's behalf and making Furlong a party to it. Under these circumstances, Furlong as an involuntary party/signatory to the agreement must receive the benefits of, and be treated as if it had executed, the JOA, and therefore participate in carrying the nonconsenting owners.[4]

For the above reasons, the Board cannot find that Furlong has "agreed otherwise" when it comes to bearing its share of the nonconsenting owners' interests. Therefore, Utah Code Ann. Section 40-6-6.5(4)(c) dictates, and the Board holds, that Furlong will carry its proportionate share of the nonconsenting parties interests and will share in recoupment of the risk compensation award. The Motion is therefore denied as to this issue.

II. Other statutory considerations and factors argued by EPE.

EPE notes that the force-pooling statute generally instructs that the Board should issue pooling order on "terms and conditions that are just and reasonable." Utah Code Ann. § 40-6-6.5(2)(b). EPE argues there is no unfairness in denying Furlong a proportionate participating role in the recoupment of the risk compensation penalty imposed upon the non-operators because Furlong did not make its election to participate until after the well had been drilled, and did not assume the same risk as the other owners. Motion at 7-8.

The Board notes that the timing of Furlong's signing of the AFE and electing to participate in the well is a function of when it receives notice from the operator, EPE, of its opportunity to do so (via the transmittal of an AFE, etc.). This did not occur in this case until

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[4] Furlong argues that because the JOA was imposed and not agreed upon, the JOA cannot be used to argue that Furlong has somehow "agreed otherwise" regarding this issue. Opposition at 2-3. However this issue is approached, the Board concludes that Furlong must share in the carrying of the nonconsenting owners and recoupment of the nonconsent penalty.

after drilling had commenced, and Furlong's duty to make an election was not triggered until then. It is a common occurrence in pooling matters before the Board that certain working interest owners do not receive notice of an opportunity to participate in a well until after drilling has commenced, and nevertheless elect to both participate and help carry the nonconsenting owners. Indeed, it appears that EPE would have had no problem with Furlong doing so in this matter had Furlong initially signed the EPE-proposed JOA that has now been imposed by the Board. Nor can it be said that Furlong, even in electing to participate after drilling has commenced, has taken no risk in regards to the possible failure of the well to recoup drilling and completion costs. This is true because those risks, although reduced, remain outstanding after completion of the well and are not fully avoided until after the well has paid out (if that occurs). Until then, there is always a risk that the well ceases producing in paying quantities prior to payout being reached, resulting in a loss of some of the drilling and completion costs incurred.[5]

And again, as noted above, the specific, controlling, statutory provision on this question mandates that Furlong, absent an agreement to the contrary, is to share in recouping the applicable nonconsent penalties.

III. Which of Petitioner's counsel's legal fees, and other expenses incurred in this matter, if any, are chargeable to Furlong as a consenting owner?

As an alternative argument, EPE asks the Board, if it permits Furlong to share in recoupment of the nonconsent penalty, to clarify that Furlong must pay its share of the legal fees

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[5] While it is true that the decision to drill the well cannot be un-made, and the risk taken cannot be undone, until the well reaches payout (and the full costs of drilling and completion are recouped), the ongoing risk of loss of some portion of those costs remains outstanding. By electing to participate in a well after drilling has occurred (due to receiving delayed notice), but prior to payout, especially very early in the life of the well where limited production data is available, a consenting owner still undertakes some risk of losing money.

and other costs incurred in bringing this matter to compulsorily pool the interests of Argo and Sanderson. Motion at 9.

The Board appreciates EPE's concern regarding this issue, but it appears this request for clarification asks the Board to render an advisory opinion about a dispute that may arise based upon future joint interest billings. For this reason, it would not be appropriate for the Board to weigh in on this question at this juncture. Additionally, even once such a dispute potentially ripens, it will involve a contract dispute under the JOA of a kind not ordinarily resolved by this Board.[6] Such disputes are instead ordinarily resolved by courts. Although the statute charges the Board with selecting a form of operating agreement to impose, it does not make the Board a court of general jurisdiction that may appropriately adjudicate every dispute that might later arise under that agreement. Although Utah Code Ann. Section 40-6-9 contemplates the Board granting limited relief as it concerns the payment of proceeds, that statute also contemplates the Board allowing the parties to instead go to court in many circumstances. *See, e.g.,* Utah Code Ann. Section 40-6-9(6)(b). This includes cases where proceeds payment disputes implicate some underlying good faith question concerning entitlement to payment that might appropriately be resolved in the courts. *See* Utah Code Ann. Section 40-6-9(7)(d), -9(8) and -9(9). The Board views this potential dispute concerning future joint interest billings as falling into this category. The therefore does not reach this issue at this time.

For the reasons discussed above, the Board denies the Motion.

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[6] Furlong's Opposition brief suggests this potential dispute may hinge not upon the imposed JOA alone, but also (or instead) upon common law doctrines concerning attorney's fees liability. *See* Opposition at 4 (discussing American Rule regarding parties generally paying their own attorney's fees in the absence of a contrary statute or contract). Either way, this is not the kind of dispute typically or appropriately resolved by the Board (as opposed to the courts).

Dated this 13th day of October, 2015.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING

Ruland J Gill, Jr., Chairman

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 2015, I caused a true and correct copy of the foregoing ORDER RESOLVING AUGUST 3, 2015 MOTION FOR RECONSIDERATION for Docket No. 2015-013, Cause No. 139-130, to be transmitted via email to the following:

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And that that on the 14th day of October, 2015, I caused a true and correct copy of the foregoing ORDER RESOLVING AUGUST 3, 2015 MOTION FOR RECONSIDERATION for Docket No. 2015-013, Cause No. 139-130, to be mailed, postage prepaid, to the following:

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